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26
27 UNITED STATES DISTRICT COURT
28
29 DISTRICT OF NEVADA

30 Cung Le, Nathan Quarry, and Jon Fitch,
31 Brandon Vera, Luis Javier Vazquez, and Kyle
32 Kingsbury, on behalf of themselves and all
33 others similarly situated,

34 Plaintiffs,

35 v.

36 Zuffa, LLC, d/b/a Ultimate Fighting
37 Championship and UFC,

38 Defendant.

39 No.: 2:15-cv-01045-RFB-(PAL)

40 PLAINTIFFS' REPLY BRIEF IN SUPPORT
41 OF EMERGENCY MOTION TO COMPEL
42 PRODUCTION OF DOCUMENTS
43 WITHHELD ON PRIVILEGE GROUNDS
44 AND FOR OTHER RELIEF

45 (EXPEDITED HEARING REQUESTED)

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1 **I. INTRODUCTION**

2 Zuffa has produced 11,919 discoverable documents since June 30, documents it withheld until
 3 the end of discovery, on the eve of the last few depositions in this case. Zuffa's most recent iteration of
 4 its Rule 26 privilege log was produced on July 11, more than ten months after Zuffa certified substantial
 5 completion of its document production to the Court. Dkt. 297 at 2. This third iteration of the privilege
 6 log is still deficient despite numerous efforts to meet and confer by the parties. Zuffa's opposition brief
 7 provides no legitimate justification for the unresolved deficiencies in its log or its continued delay.

8 Zuffa ignores the impact of its tardy and improper efforts to shield the production of documents
 9 through its claims of privilege. Plaintiffs have sustained substantial unfair prejudice as a result of Zuffa's
 10 tardy assertion of privilege claims. Zuffa has no legitimate explanation for not producing its log of the
 11 30,092 documents withheld from production until April 2017, shortly before the discovery cut off.
 12 Plaintiffs sustained substantial prejudice when they deposed multiple witnesses without the benefit of
 13 thousands of discoverable documents that Zuffa improperly withheld. Zuffa's production of nearly
 14 12,000 documents within the last three weeks does not remedy these deficiencies. It only highlights the
 15 problem. Zuffa should not have withheld these documents from Plaintiffs in the first place.

16 Plaintiffs' claims are not moot. Plaintiffs are entitled to remedies under Rule 26, including
 17 remedies with respect to the depositions Plaintiffs took without the benefit of the improperly withheld
 18 documents. Of the 18,734 documents remaining on Zuffa's privilege log, there are hundreds—if not
 19 thousands—of documents with respect to which Zuffa has failed to properly assert privilege. These
 20 include (1) items for which there are vague and incomplete descriptions; (2) items for which Zuffa fails
 21 to disclose sufficient information to distinguish between business and legal advice; and (3) items which
 22 either were not communicated to a lawyer or which were not kept in confidence such that any arguable
 23 protection was waived. Many of these are relevant to the depositions yet to be taken in the case as well
 24 as those Plaintiffs have already taken.

25 In light of Zuffa's lengthy delay, and its failure to cure the defects in the privilege log, a finding
 26 that Zuffa has waived any privilege over the documents remaining in the July 11 revised privilege log is
 27 justified at this juncture. *Burlington N. & Santa Fe Ry. v. United States Dist. Court*, 408 F.3d 1142 (9th
 28 Cir. 2005) (“*Burlington N. & Santa Fe Ry.*”).

1 Plaintiffs have requested that the Court set forth an expedited procedure for adjudicating any
 2 disputed claims with respect to withheld documents identified on any revised privilege log. *See In re*
 3 *Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 790-91 (E.D. La. 2007) (discussing implementation of
 4 procedure for resolving disputed privilege claims pursuant to order of Fifth Circuit).

5 **II. FACTUAL AND PROCEDURAL BACKGROUND.**

6 Since the filing of Plaintiffs' motion to compel (Dkt. 443), Zuffa has produced 11,919 documents
 7 that were previously withheld or redacted, including 207 documents produced on July 21. Saveri Decl.
 8 ¶¶ 5-8, Exhs. 1-4. Zuffa provided a revised privilege log containing 18,733 entries on July 11, ten days
 9 before its most recent production. Saveri Decl. ¶ 11. Many of the newly produced documents relate to
 10 depositions of Zuffa witnesses and third parties already taken by Plaintiffs. Saveri Decl. ¶ 10, 18, Exh. 5.
 11 Many of the 18,734 entries on the privilege log relate to these depositions as well. *Id.* ¶ 16.

12 As a practical matter, it would not have been reasonable—and indeed it would have been
 13 impossible—to review Zuffa's privilege claims before the completion of discovery. Saveri Decl. ¶ 17.

14 At the July 13 hearing, the Court ordered Zuffa to produce a sample of the documents Zuffa has
 15 withheld from production. (Dkt. 460). Under the Court's procedure, Zuffa was ordered to submit every
 16 fourth document to or from Dana White as found on the privilege log. *Id.* On July 21, Zuffa produced
 17 207 documents based on their re-review of the White documents. Some of these documents are clearly
 18 not privileged. *See e.g.* Dkt. 459 (Entry 2609 in Dana White Privilege Log, ZFL-2764704).

19 On July 14, 2017, Joseph Saveri wrote to Stacey Grigsby indicating that Plaintiffs' preliminary
 20 review indicated the log was still deficient and offered to meet and confer regarding the log. Saveri Decl.
 21 ¶ 22, Exh. 10. Ms. Grigsby refused to meet and confer until July 21. *Id.* On July 23, Mr. Saveri wrote to
 22 Ms. Grigsby to ask if the production of 207 documents on July 21, ten days after Zuffa produced its
 23 revised privilege log, would require yet another revision to the privilege log, and to ask whether Zuffa
 24 would be producing any more documents. Saveri Decl. ¶ 23, Exh. 11. On July 24, Zuffa replied that it
 25 would provide a privilege log addendum "this week," and that there may be more documents produced
 26 in response to challenges from Plaintiffs. *Id.*

1 **III. ARGUMENT**

2 **A. Zuffa Cannot Reasonably Dispute that its Substantial Delay in Producing a**
 3 **Privilege Log and its Recent Production of Thousands of Additional Documents**
 4 **Has Unfairly Prejudiced Plaintiffs.**

5 There is no dispute that Plaintiffs have been forced to proceed with discovery without the
 6 benefit of thousands of documents withheld from production until well after substantial deposition
 7 discovery was taken. There is also no dispute that Plaintiffs were unreasonably forced to proceed with
 8 the depositions without a reasonable opportunity to review the recent production of nearly 12,000 new
 9 documents. There is also no dispute that under Rule 26(b)(5), Plaintiffs are entitled to ensure that
 discoverable documents have not been improperly withheld.

10 It is a basic principle underlying the Federal Rules of Civil Procedure that the party seeking
 11 discovery is entitled to review relevant documents before depositions of witnesses, particularly when
 12 the documents come from the witnesses' files. Indeed, while the 30-day default for producing privilege
 13 logs is a guideline, that guideline nonetheless requires that privilege claims be asserted within a
 14 reasonable time after the documents are produced. *See Burlington N. & Santa Fe Ry.*, 408 F.3d at 1149.
 15 This is only logical, as it permits privilege claims to be addressed in a timely manner and avoids the very
 16 type of inefficiency and hard to remedy prejudice Zuffa has caused here.

17 Zuffa asserts that Plaintiffs cannot claim they are prejudiced by the burden of reviewing the
 18 latest privilege log. Opposition at 11. This misses the point. Plaintiffs have reviewed each of the three
 19 iterations of the privilege log Zuffa has provided in detail. Saveri Decl. ¶¶ 3, 11. Plaintiffs have met and
 20 conferred extensively. Saveri Decl. ¶¶ 3, 4, 22, 23, Exhs. 10, 11. The prejudice Plaintiffs have sustained
 21 is a fundamental frustration of the discovery process. Plaintiffs have been deprived of the discovery of
 22 many discoverable documents to date and likely additional ones in the future. Plaintiffs have been
 23 deprived or limited in their ability to take sworn testimony of important percipient witnesses with the
 24 benefit of those documents. Any assertion by Zuffa that it was entitled to withhold discoverable
 25 documents until after Plaintiffs' have taken the depositions would be unfair and inconsistent with the
 26 Federal Rules. *See Fed. R. Civ. P. 26, Advisory Comm. Note (2013)* ("the spirit of the rules is violated
 27 when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts").

Zuffa also asserts that Plaintiffs cannot claim that the privilege log contains insufficient detail because Plaintiffs “have challenged Zuffa’s privileged designations based on what they now characterize as a ‘deficient’ log.” Opposition at 8-9. But this claim has it backward. Plaintiffs challenged the documents withheld precisely because the privilege log’s descriptions were deficient, and Zuffa, by producing nearly 12,000 documents in response, has tacitly admitted the descriptions are deficient.¹

B. Zuffa’s Latest Privilege Log Remains Inadequate

Zuffa’s July 11 privilege log² is inadequate. Despite having two years since Plaintiffs served their requests for production, many hours of meeting and conferring and three attempts, the log remains deficient in material ways. First, there are many items for which there are vague and incomplete descriptions. Second, there are many items for which Zuffa fails to disclose sufficient information to distinguish between business and legal advice. Third, there are many items which either were not communicated to a lawyer or which were not kept in confidence, waiving privilege. Of course, Zuffa bears the burden of demonstrating the correctness of its privilege claims. *See Equal Employment Opportunity Comm’n v. BDO USA LLP*, 856 F.3d 356, 362 (5th Cir. 2017) (“EEOC”). Because the attorney-client privilege “has the effect of withholding relevant information from the fact-finder,” it is interpreted narrowly and “applies only where necessary to achieve its purpose.” *Id.*

1. Items With Vague Or Incomplete Descriptions

Zuffa’s vague or incomplete descriptions prevent the Plaintiffs—and the Court—from determining or assessing the basis of the privilege claims. A privilege log is insufficient when it “fails to describe the claimed privileged information in a manner that would allow the Court to assess the claim.” *Phx. Ins. Co. v. Your Vitamins, Inc.*, No. 2:12-cv-00564-MMD-NJK, 2013 U.S. Dist. LEXIS 15479, at *6 (D. Nev. Feb. 5, 2013). “[S]imply describing a lawyer’s advice as ‘legal,’ without more, is conclusory and insufficient to carry out the proponent’s burden of establishing attorney-client privilege.” *EEOC*,

¹ In fact, the entire privilege log is deficient. In the course of meeting and conferring and in an effort to reduce the burden on Zuffa, Plaintiffs agreed to limit their challenge to entries likely to be relevant to Plaintiffs’ core claims. Plaintiffs selected entries relating to negotiation of fighter contracts, acquisitions, corporate matters, and investments in Zuffa. Saveri Decl., ¶ 4. Plaintiffs’ decision not to challenge entries relating to venues, sponsors, broadcasters, and other topics, is by no means an admission that those entries are sufficient. Those entries—and indeed, the entire privilege log—are lacking in the detail sufficient to disclose why the documents withheld are entitled to be shielded from discovery.

² As noted, given subsequent productions, the July 11 log now appears to be out of date as well.

1 856 F.3d at 365. Determining privilege claims “should not be a guessing game for the [c]ourt.” *Id.* at 363.
 2 (quotation and citation omitted).

3 Many of Zuffa’s entries do not provide a substantive description of the subject matter. Despite
 4 Plaintiffs’ calls for more detail, many of the privilege log descriptions still refer to “legal advice”
 5 regarding fighter contracts, acquisitions, or corporate matters, with no further detail. *See Saveri Decl.* ¶ -
 6 , Exh. 6. Even where Zuffa has added more detail, it still fails to satisfy the requirements of Rule
 7 26(b)(5). Descriptions such as “[e]mail providing legal advice regarding fighter contracts and the legal
 8 effect of a fighter’s contract” or “[e]mail providing legal advice regarding fighter contract negotiation”
 9 still fail to provide sufficient detail for Plaintiffs to assess the claim. *See Saveri Decl.* ¶ 11, Exh. 6.
 10 Moreover, given this lawsuit involves disputes regarding Zuffa’s business practices, the term “corporate
 11 matters” is so vague and open-ended as to be meaningless in assessing the basis for the privilege claims.

12 Zuffa provides no legal authority for the proposition that its vague descriptions are adequate.
 13 Indeed, the authority is to the contrary. The purpose of the Rule 26 requirement regarding withheld
 14 documents is well-established.

15 The purpose . . . is to provide the party seeking discovery with a basis for
 16 determining what documents the party asserting the privilege has
 17 withheld. Otherwise, how could this opposing party ever know whether
 18 the documents withheld under a blanket privilege objection were withheld
 correctly, incorrectly, or maliciously? [Defendant] would have the court
 believe that an opposing party must simply trust the good faith and
 diligence of the party asserting the privilege.³

19 *Eureka Financial Corp. v. Hartford Accident and Indemnity Co.*, 136 F.R.D. 179, 183-84 (E.D. Cal. 1991).
 20 Under Rule 26(b)(5), courts require substantial specificity. For example, the court in *Heartland Surgical*
 21 *Specialty Hosp., LLC v. Midwest Div.*, Inc., No. 05-2164-MLB-DWB, 2007 WL 625809, at *2-3 (D. Kan.
 22 Feb. 23, 2007) examined the requirements of specificity to substantiate a privilege or work product
 23 claim, and provided guidance that is applicable here. The court required, for each document withheld,

24 [t]he identity of the person(s) for whom the document was prepared, as
 25 well as the identities of those to whom the document and copies of the
 document were directed, including an evidentiary showing based on

26
 27 ³ *Id.* at 183 n.9 (“All too often, the blanket privilege is asserted by counsel who have not carefully
 28 reviewed the pertinent documents for privilege. In an abundance of caution, counsel withhold
 documents that are not privileged, thus defeating the full and fair information disclosure that discovery
 requires.”).

1 competent evidence supporting any assertion that the document was
 2 created under the supervision of an attorney [.]

3 *Id.* At *2-3. Further, the Court required the producing party to describe

4 [t]he purpose of preparing the document, including an evidentiary
 5 showing, based on competent evidence, supporting any assertion that the
 6 document was prepared in the course of adversarial litigation or in
 7 anticipation of a threat of adversarial litigation that was real and
 8 imminent; a similar evidentiary showing that the subject of
 9 communications within the document relates to seeking or giving legal
 10 advice; and a showing, again based on competent evidence, that the
 11 documents do not contain or incorporate non-privileged underlying
 12 facts

13 *Id.* Zuffa's log fails to meet these standards.

14 Indeed, Zuffa's logging of emails is particularly deficient. As Chief Judge Stewart of the Fifth
 15 Circuit recently stated in *EEOC*, logging of emails for privilege can be "problematic." 856 F.3d at 363.
 16 Here, as in *EEOC*, Zuffa's privilege log entries "do not indicate whether a particular entry consists of
 17 one email or a string of emails." *Id.* at 364. As the *EEOC* court noted, these distinctions may be
 18 dispositive as to privilege claims where some recipients receive only a portion of an email string while
 19 others may receive the whole string. *See id.* And because some of the recipients may not be part of the
 20 attorney client relationship, the privilege may be destroyed because the communication is not
 21 confidential. *Id.; see infra* III.B.3. Moreover, "one email within a strand 'may contain entirely factual and
 22 thus non-privileged information, while another email within the same strand may quite clearly seek or
 23 render legal advice'" *Id.* (*quoting In re United Serv. Fund Tel. Billing Prac., Litig.*, 232 F.R.D. 669, 671 (D.
 24 Kan. 2005)).

25 Redacted documents included in Zuffa's privilege log demonstrate that the information provided
 26 does not contain complete information regarding whether a document consists of a single email or an
 27 email chain, or—if it is an email chain—who was included in the email chain or what the subject matter
 28 of the unidentified emails is. For example, entry number 24165 is described as an email from Lawrence
 Epstein to Tracy Long. But the document contains three individual emails and nineteen
 senders/recipients not identified in the privilege log. Saveri Decl. ¶ 12, Exh. 7. But an examination of
 the document reveals that this is an email chain with seven individual emails and six other
 senders/recipients that are not identified in the privilege log. Saveri Decl. ¶ 12, Exh. 8 (ZFL-2700730).

1 While Plaintiffs do not dispute Zuffa's redactions in this document, the document illustrates the global
 2 problem with Zuffa's privilege log, especially with regard to emails withheld in their entirety. Plaintiffs
 3 have no way of knowing how many emails are actually contained within these documents, who the
 4 unidentified emails are to or from, what the subject matter is, or whether they may contain non-
 5 privileged emails because the privilege log omits this key information. This is exactly the problem
 6 identified by the court in *EEOC*.856 F.3d at 364

7 **2. Documents For Which Zuffa Fails To Distinguish Between Legal And**
 8 **Business Advice**

9 As this Court has held, "in order for a communication that pertains to both business and legal
 10 advice to be considered privileged, the 'primary purpose' must be to obtain or give legal advice." *Le v.*
 11 *Zuffa, LLC*, No. 2:15-cv-01045-RFB-PAL, 2017 U.S. Dist. LEXIS 20614, at *14 (D. Nev. Feb. 13, 2017)
 12 (quoting *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 628 (D. Nev. 2013)). Where, as here, "in-house
 13 attorneys charged with providing legal advice about the business transaction also were instrumental in
 14 implementing that transaction, . . . assessing whether a particular communication was made for the
 15 purpose of securing legal advice (as opposed to business advice) becomes a difficult task." *United States*
 16 *v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1069 (N.D. Cal. 2002).

17 Many of the items on the log involve internal communications with Zuffa's in-house counsel for
 18 which the descriptions are inadequate. *See* supra at III.B.1. With the Court's prior rulings in hand, Zuffa
 19 has now failed three times to properly describe the materials withheld in a manner that provides the
 20 required factual information, and Zuffa continues to incorrectly withhold documents. As noted above,
 21 Zuffa persists with descriptions that include nothing more than a conclusory reference to legal advice.
 22 *See* Saveri Decl. ¶ 11, Exh. 6. Those descriptions fail to provide sufficient information to distinguish
 23 between protected legal advice and other non-protected communication.

24 Zuffa does not attempt to explain how its privilege log descriptions comply with Rule 26.
 25 Instead, Zuffa argues it has less of a burden because many of its executives were lawyers and Plaintiffs
 26 have sought many of their documents. Opposition at 11. This is exactly backwards: because in-house
 27 counsel may be involved in business decisions or activities, there is no presumption of privilege, unlike
 28 communications with outside counsel. *Chevron*, 241 F. Supp. 2d at 1076. Indeed, these documents must

1 be described with even more granularity and specificity than other documents. *Id.* (“[w]ith respect to
 2 internal communications involving in-house counsel, [defendant] must make a ‘clear showing’” that the
 3 “primary purpose” of the communication is to secure legal advice).

4 In the case of “in house” lawyers, distinguishing between legal advice and business functions or
 5 business advice requires detailed descriptions and careful scrutiny. *See EEOC*, 856 F.3d at 365-66;
 6 (communications with in-house counsel “present unique challenges” that “warrant[] closer scrutiny”);
 7 *Koumoulis v. Indep. Fin. Mktg. group, Inc.*, 295 F.R.D. 28, 39 (E.D.N.Y. 2013); *In re Vioxx Prods. Liab.
 Litig.*, 501 F. Supp. 2d 787, 789 (E.D. La. 2007). As Zuffa admits, Zuffa personnel played blurred and at
 9 least dual roles. *See* Opposition at 2 (Zuffa’s in-house counsel and legal staff “were responsible, at
 10 various times, for both legal and non-legal aspects of Zuffa’s business, as is the case for legal employees
 11 at many corporations”); *Id.* at 11, (Zuffa’s custodians included “high-ranking attorneys and legal
 12 personnel whose duties at Zuffa include both making business decisions and providing legal advice—
 13 often simultaneously”). It was Zuffa’s decision to structure and operate its business as it did through the
 14 employment of lawyers in key positions. That decision should not somehow relieve Zuffa of its Rule 26
 15 obligation to properly distinguish between privileged and non-privileged communications, and
 16 Plaintiffs’ rights to obtain discovery of relevant information should not be constrained as a result.
 17 Zuffa’s vague descriptions fail to satisfy the requirements of Rule 26.

18 Indeed, in circumstances such as these, where the distinction between discoverable and non-
 19 discoverable information is blurred by the acts of the producing party, courts routinely require that the
 20 descriptions must be quite specific.⁴ *RKF Retail Holdings, LLC*, 2017 U.S. Dist. LEXIS 80436, at *19
 21 (“A privilege log that merely states that the document contains privileged analysis and reflects advice of
 22 counsel is vague and generic and does not allow the court or the opposing party to adequately assess the
 23 claim of privilege.”); *see EEOC* at 362. Courts have provided examples of proper description which

24
 25 ⁴ This distinction undercuts Zuffa’s complaints regarding Plaintiffs’ privilege log. Opposition at 11-12.
 26 The withheld documents, as indicated in Plaintiffs’ privilege log are communications between outside
 27 lawyers and plaintiffs, who are all natural persons. Saveri Decl. ¶ 24. The descriptions are sufficient to
 show that the communications are privileged. Moreover, the privilege log is relatively small and was
 provided early this year on February 2, before Zuffa deposed all Plaintiffs except Nate Quarry, whose
 deposition Zuffa took earlier to support its motion for partial summary judgment. *Id.* Also, this is Zuffa’s
 first mention of any issues regarding Plaintiffs’ privilege log, despite possessing it for nearly six months.
Id.

1 Zuffa ignores. *See Heartland Surgical Specialty Hosp., LLC v. Midwest Div.*, Inc., at *2-3 (describing
 2 description of documents sufficient under Rule 26(b)(5)).

3 In contrast, Zuffa's privilege log descriptions are inadequate and vague. Document-by-document
 4 consideration is thus appropriate at this juncture. It is now too late in the day for another privilege log.
 5 And given the Court's prior rulings on this point, it was Zuffa's clear burden to be careful and detailed
 6 in its privilege log descriptions. Zuffa has demonstrated it cannot or will not describe the documents
 7 withheld more specifically. *See In re Joy Global, Inc.*, No. 01- 039-LPS, 2008 WL 2435552, at *4 (D. Del.
 8 June 16, 2008) ("With its non-privilege objections now overruled, the time has come for Joy to provide
 9 specific document-by document assertions of privilege or work product protection if it is going to
 10 continue to refuse to produce documents responsive to the Relevant Request.").

11 **3. Communications Not Maintained In Confidence With Attorneys**

12 Even if they were privileged, many of the items that remain on Zuffa's privilege log are no longer
 13 privileged because they were not maintained in confidence. "The attorney-client privilege is waived
 14 when communications are made in the presence of third parties." *Cung Le v. Zuffa, LLC*, No. 2:15-cv-
 15 01045-RFB-PAL, 2016 U.S. Dist. LEXIS 69813, at *21 (D. Nev. May 26, 2016). "[D]isclosures of any
 16 significant portion of a confidential communication waives the privilege as to the whole." *EEOC*, 856
 17 F.3d at 366 (quoting *El Paso*, 682 F.2d at 539 and *United States v Davis*, 636 F. 2d 1028, 1043 n.18 (5th
 18 Cir. 1981))

19 There are numerous documents on the privilege log where it appears no one to whom they were
 20 communicated was a lawyer. For example, entry numbers 5702, 17597, and 19631 contain no attorneys.
 21 Saveri Decl. ¶13, Exh. 9. Several examples include a paralegal but no attorney. *See Id.*, entry numbers
 22 19259, 21408. Absent facts that advice from an attorney was conveyed, a paralegal's advice is not
 23 privileged. *See HPD Labs., Inc. v. Clorox Co.*, 202 F.R.D. 410, 416 (D.N.J. 2001) (stating that "federal
 24 law does not recognize a freestanding paralegal privilege") (quotation and citation omitted). In the
 25 entries cited and others, Zuffa has failed to identify the attorney whose advice was allegedly conveyed or
 26 sought, and thus failed to carry its burden to show privilege. *See Id.*

27 There are also numerous documents transmitted to third parties. These communications are
 28 also not privileged. For example, entry numbers 2176, 2611, 18700, and 19631 all include third parties

1 not identified as attorneys in the privilege log. Saveri Decl. ¶ 15, Exh. 9. In light of Zuffa's failure to
 2 identify all emails within its documents, all senders and recipients, and the subject matter of all emails,
 3 Plaintiffs cannot adequately assess whether there may be more non-privileged documents being
 4 withheld by Zuffa. *See supra* at III.B.1.

5 **C. Zuffa Ignores the *Burlington Northern* Factors**

6 Zuffa's efforts to justify its mishandling of its privilege claims under *Burlington* falls far short.
 7 Given the late stage of the litigation and the difficulty in providing a remedy that restores Plaintiffs to
 8 their position if Zuffa had asserted its privilege claims in a proper and timely manner, a finding of waiver
 9 is appropriate.

10 Zuffa protests that Plaintiffs fault Zuffa for not producing a privilege log before it received a
 11 document request. Nonsense. Plaintiffs fault Zuffa for not complying with Rule 26(b)(5) which requires,
 12 in conjunction with Rule 34, that the producing party produce documents and expressly provide a
 13 specific description of documents within 30 days of the request for production. *See Burlington* at 1149
 14 (30 days is a "default guideline"). As Zuffa admits, it never discussed the timing of its privilege log with
 15 Plaintiffs or raised any issues regarding the form or timing of the log. Opposition at 10. Here, Zuffa
 16 produced its privilege log years after the production of its documents commenced. In *Burlington*, the
 17 court found that a production of privilege log five months after the production of documents, in
 18 conjunction with other factors, was an important factor in finding waiver. Here the delay is far longer.
 19 408 F.3d at 1149 ("In the absence of mitigating considerations, [a five-month delay] alone would
 20 immunize the district court's ruling from reversal under the standard just articulated.").

21 Zuffa appears to argue that the reasonableness of the timing of its privilege claim should be
 22 judged by when it produced its last documents without regard to the volume of documents that it
 23 produced before, the time it took to produce them, and the impact of that production on the other
 24 aspects of the discovery schedule.

25 As in *Burlington*, by providing only boilerplate descriptions that lack specifics (as discussed
 26 above), Zuffa has made it very difficult—if not impossible—for Plaintiffs to conduct remaining
 27 discovery and evaluate Zuffa's privilege claims. *See supra* at I. Also, as in *Burlington*, Zuffa delayed the
 28 production until substantial deposition discovery was completed. Opening Brief at 8. Zuffa's production

1 of 11,809 new documents in the last several weeks and a revised privilege log on July 11, 2017 is the
 2 latest chapter. Zuffa has no answer to the point that it produced its privilege log and has continued to
 3 produce improperly withheld documents until the end of discovery, on the eve of several key
 4 depositions and after many depositions.

5 Moreover, Zuffa continues to ignore key deficiencies in its handling of its privilege claims,
 6 leaving Plaintiffs little recourse. Confronted with analogous facts, Judge Cooke's handling of the *Bullion*
 7 *Monarch Mining* case is instructive. There, the Court found the producing party—like Zuffa—“well
 8 knew that prompt document review and production of the documents and the log was of utmost
 9 importance and failed to take steps to insure that the privilege log would be produced until well past the
 10 time it could be of use to [the plaintiffs].” *Bullion Monarch Mining, Inc. v. Newmont USA Ltd.*, 271 F.R.D.
 11 643, 649-50 (D. Nev. 2010). The producing party in *Bullion*—like Zuffa—never communicated with the
 12 plaintiffs “about the status of the privilege log, or to seek assistance from the court to establish a
 13 realistic time frame to produce the privilege log.” *Id.* at 649.⁵ See Opposition at 10 (“the parties never
 14 discussed the timing of producing their respective logs”). In *Bullion*, the Court specifically asked the
 15 producing party about remedies. *Id.* at 649. There, the producing party even offered that the requesting
 16 party should be permitted to depose new witnesses, redepose other witnesses and file a more targeted
 17 motion for sanctions. *Id.* The Court noted it would, even in that event, still likely be required to conduct
 18 additional *in camera* review to address the documents still withheld. But, as the Court concluded, “This
 19 takes time, and there is no time left.” *Id.* On the basis of consideration of the *Burlington* factors and the
 20 facts of the case, the Court recognized that it was not possible to undo the prejudice caused without the
 21 expenditure of significant time and effort and redoing of much of the work that had come before. *Id.* at
 22 650.⁶ Therefore the Court found that the application of the *Burlington* factors strongly favored a finding
 23 of waiver of privilege.

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 26 ⁵ Meanwhile, Zuffa complained that Plaintiffs had not scheduled depositions and strenuously objected
 27 to any extension of the discovery schedule, asserting it was the fault of Plaintiffs. June 1, 2017 Status
 Conference Tr. at 97-98. In retrospect, this strategy seems intended to force Plaintiffs into taking
 28 depositions without the benefit of the improperly withheld documents and to deny Plaintiffs an
 opportunity to challenge the documents withheld.

⁶ The privilege log in *Bullion* contained 1126 entries. *Id.* at 650.

1 Each of the factors that led the *Bullion* court to find waiver are present here. Zuffa failed to
2 ensure the timely production of its privilege log. Zuffa failed to communicate with Plaintiffs about the
3 status of its privilege log. Zuffa unfairly prejudiced Plaintiffs when it improperly withheld nearly 12,000
4 documents until the very end of discovery. It has continued to fail to provide an adequate privilege log.
5 And there is no time left to fix Zuffa's failures in a way that would provide an adequate remedy and undo
6 the prejudice Plaintiffs have suffered. Zuffa has waived privilege by failing to comply with the
7 requirements of Rule 26 and Rule 34.

8 **IV. CONCLUSION**

9 For the reasons stated above, this court should grant Plaintiffs' motion to compel.

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Respectfully Submitted,

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